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1 outlines categories of material that should be maintained in confidence, along with procedures for
2 sealing confidential material when included in documents filed with the Court. Specifically,
3 paragraph 1 states that:

4 Confidential Business Information is information which has not
5 been made public and which concerns or relates to the trade secrets
6 . . . amount or source of any income, profits, losses, or expenditures
7 of any person, firm, partnership, corporation, or other organization,
8 the disclosure of which information is likely to have the effect of
9 causing substantial harm to the competitive position of the person,
10 firm, partnership, corporation, or other organization from which the
11 information was obtained. . . .

12 *Id.* at 1-2. This information should be marked as “CONFIDENTIAL BUSINESS
13 INFORMATION, SUBJECT TO PROTECTIVE ORDER.” *Id.* at 2. Additionally, paragraph 6
14 specifies that:

15 (1) Confidential Business Information pertaining to licensing or
16 other commercially sensitive financial information shall not be made
17 available under this paragraph 6 to such designated in-house
18 counsel; the supplier shall designate such Confidential Business
19 Information pertaining to licensing or other commercially sensitive
20 financial information as “[SUPPLIER’S NAME] CONFIDENTIAL
21 FINANCIAL INFORMATION – OUTSIDE ATTORNEYS’ EYES
22 ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly
23 provide a redacted version of such document that may be
24 disseminated to the two in-house counsel designated under this
25 paragraph 6. . . .

26 *Id.* at 4. Finally, Paragraph 2 of the Protective Order governs the sealing of documents, and states
in relevant part that:

27 During the pre-trial phase of this action, such information, whether
28 submitted in writing or in oral testimony, shall be disclosed only *in*
29 *camera* before the Court and shall be filed only under seal, pursuant
30 to Rule 5(g) of the Local Civil Rules of the United States District
31 Court for the Western District of Washington.

32 *Id.* at 2.

33 Thus, the Protective Order provides that Motorola may request to seal documents by
34 formal motion pursuant to Local Rule 5(g). Local Rule CR 5(g)(3) states that:

If a party seeks to have documents filed under seal and no prior order in the case or statute specifically permits it, the party must obtain authorization to do so by filing a motion to seal or a stipulation and proposed order requesting permission to file specific documents under seal. The court will allow parties to file entire memoranda under seal only in rare circumstances. A motion or stipulation to seal usually should not itself be filed under seal. A declaration or exhibit filed in support of the motion to seal may be filed under seal if necessary. If possible, a party should protect sensitive information by redacting documents rather than seeking to file them under seal. A motion or stipulation to seal should include an explanation of why redaction is not feasible.

Similarly, the Federal Rules of Civil Procedure recognize that courts should protect trade secrets or other confidential commercial information by reasonable means, permitting the filing under seal of documents containing such information. *See Fed. R. Civ. P. 26(c)(1)(G) and (H)* (stating that a court may require that (1) “a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way” and (2) “the parties simultaneously file specified documents or information in sealed envelopes . . .”).

Though courts recognize a general right to inspect and copy public records and documents, including judicial records, the United States Supreme Court has stated that this right is limited. “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). In discussing examples of improper purposes, the Court indicated that courts are not to serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*

As the Ninth Circuit stated:

The law, however, gives district courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information. *See Fed. R. Civ. P. 26(c)(7)*. Rule 26(c) authorizes the district court to issue “any order which justice requires to protect a party or person

1 from annoyance, embarrassment, oppression, or undue burden.”
 2 The Supreme Court has interpreted this language as conferring
 3 “broad discretion on the trial court to decide when a protective order
 is appropriate and what degree of protection is required.” *Seattle*
Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

4 *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

5 **III. THE PROTECTIVE ORDER BOTH PERMITS AND REQUIRES MOTOROLA
 6 TO FILE THIS MOTION FOR LEAVE TO SEAL**

7 In accordance with the Protective Order and the above-referenced authority, Motorola
 8 moves to file the following documents under seal for the stated reasons:

9 **A. Limited Portions of Defendants’ Opposition to Microsoft’s Motion for Leave to File
 10 Supplemental Declaration of Christopher Wion in Support of Motion for Partial
 Summary Judgment (“Opposition”).**

11 Motorola respectfully requests that limited portions of its Opposition be filed under seal
 12 because it describes confidential licensing arrangements between Motorola and a certain third
 13 party. Because this information is contained in the Opposition, Motorola has marked this
 14 document: “FILED UNDER SEAL: OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO
 15 PROTECTIVE ORDER.” This information is highly confidential and proprietary business
 16 information. Disclosure of this information to third parties and other party employees not covered
 17 by the protective order would have the potential to lead to competitive harm. Declaration of
 18 Kevin J. Post in Support of Defendants’ Opposition to Microsoft’s Motion for Leave to File
 19 Supplemental Declaration and Defendants’ Motion to File Documents Under Seal (“Post Decl.”),
 ¶ 5. In lieu of sealing the entire Opposition, Motorola has redacted only those portions of its brief
 20 that disclose this highly confidential information. Redactions were made to as little information as
 21 possible, leaving the remainder available for public review.

22 **B. Exhibit A to the Declaration of Kevin J. Post.**

23 Exhibit A to the Declaration of Kevin J. Post is the Declaration of Timothy Kowalski (“the
 24 Kowalski Declaration”). The Kowalski declaration contains highly confidential information about
 25 licensing negotiations between Motorola and a certain third party. The Kowalski declaration
 26

1 describes the specifics of these ongoing licensing negotiations, including confidential
2 communications between Motorola and this third party. Disclosure of this information to third
3 parties and other party employees not covered by the protective order would have the potential to
4 lead to competitive harm. Post Decl., ¶ 4. Because the sole purpose of the Kowalski declaration
5 is to describe the details of this licensing negotiation, and because it contains confidential
6 information throughout, the Kowalski Declaration should be sealed in its entirety. Post Decl.,
7 ¶¶ 3-4.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Motorola respectfully requests that this Court order that the
10 following documents be filed under seal:

11 1. Limited portions of Defendants' Opposition to Microsoft's Motion for Leave to
12 File Supplemental Declaration of Christopher Wion in Support of Motion for Partial Summary
13 Judgment (D.I. 112); and
14 2. Exhibit A to the Declaration of Kevin J. Post.

15 DATED this 28th day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 28th day of November, 2011.

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